Petition

NO. 81-1955

Supreme Court, U.S.
FILED
APR 19 1982
ALEXANDER L. STEVAS
CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1982

RICHARD GLEN NAAS

Petitioner

VS.

STATE OF LOUISIANA

Respondent

PETITION FOR WRIT OF CERTIORARI TO
THE SUPREME COURT OF THE
STATE OF LOUISIANA

PETITION FOR WRIT OF CERTIORARI

JAMES D. SPARKS, JR.
P. O. Box 4268
1203 Royal Avenue
Monroe, LA 71201
Tel. No. (318) 387-6573
ATTORNEY FOR PETITIONER

QUESTIONS PRESENTED

1. Whether the failure by the State to disclose to Petitioner the existence of oral inculpatory statements, allegedly made by Petitioner to an informant, who was placed in the same cell with Petitioner, with instructions to gather information from Petitioner, violates the Due Process Clause and Equal Protection Clause when the information is requested in pretrial discovery motions, and the State discovery statute mandates and requires disclosure of the existence of such statements, yet the prosecuting attorney refuses to disclose until the first day of trial.

2. Whether such conduct and deliberate failure to disclose the existence of oral inculpatory statements to the informant, until the first day of trial, violates Petitioner's Sixth Amendment rights to effective cross-examination, and the right of confrontation, where the nondisclosure prevents the Defendant from effectively preparing to confront and cross-examine the witness because of the surprise created by the nondisclosure.

3. Whether the actions of the State violates Petitioner's Sixth Amendment right to counsel, where the State plants an informant in Petitioner's cell and requests the informant to gather information from the Petitioner, after indictment and the attachment of the Sixth Amendment, and then uses the informant as a surprise witness at trial.

4. Whether the failure by the State to properly disclose to Petitioner, after a proper discovery request has been made, the existence of exculpatory information which would support Petitioner's alibi defense violates Petitioner's Due Process Rights.

5. Whether Petitioner's due process rights to discovery are violated when the State's key witness testifies during the State's presentation of the State's case in chief, that no promises, rewards, or offers of leniency were made to this witness, yet within less than one week after trial, all felony charges, consisting of five in number, are dismissed against said witness; further, whether the record reflecting the dismissal of the felony charges against the State's witness circumstantially shows the existence of such an agreement where it cannot otherwise be shown by direct testimony.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Constitutional and Statutory Provisions Involved . .	1
Statement	3
Summary of Facts Relative to Raising of Federal Question Sought to be Reviewed by Court	9
Reasons For Granting Writ	10
Conclusion	17
Certificate of Service	18
Appendix A: June 28, 1981 - Louisiana Supreme Court Opinion	A-1
Appendix B: December 14, 1981 - Rehearing Opinion	B-1
Appendix C: February 19, 1982 - Denial of Petitioner's Application For Rehearing	C-1

TABLE OF AUTHORITIES

Cases:

	Page
Brady v. Maryland, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed. 215 (1963)	16
Davis v. Alaska, 41w U.S. 310, 94 S.Ct. 1105, 39 L.Ed. 2d 347 (1974)	13
Massiah v. U.S., 377 U.S. 201, 84 S.Ct. 1199 (1964)	14
State v. Joseph, 379 So.2d 1076 (1980)	10
U.S. v. Agurs, 427 U.S. 97, 96 S.Ct. 2392, 49 L.Ed 342 (1946)	16
U.S. v. Henry, U. S. , 100 S. Ct. 2183	14
U.S. v. Narcisco, 446 F.Supp. 252 (E.D. Mich, 1976)	10

Constitution, statutes, and regulation:

United States Constitution:

Fifth Amendment	1
Sixth Amendment	1
Fourteenth Amendment	2

Louisiana Code of Criminal Procedure:

Article 716(B)	2
Article 841	2

The Petitioner, RICHARD GLEN NAAS, prays that a Writ of Certiorari issue to review the opinion and judgment of the Supreme Court of the State of Louisiana rendered on February 19, 1982.

OPINIONS BELOW

The opinion of the Louisiana Supreme Court is reported at 409 So.2d 535 (1982). The original opinion was rendered June 22, 1981, and the conviction of Petitioner reversed. See Appendix A infra, page A-1. A rehearing was applied for by the State, which was granted. On December 14, 1981, the court reversed its first opinion and affirmed the conviction. See Appendix B, page B-1. A rehearing by Petitioner was denied on February 19, 1982. See Appendix C, page C-1.

JURISDICTION

Petitioner's application for rehearing was denied on February 19, 1982. See Appendix C, page C-1. The Petition For Certiorari was filed less than sixty (60) days from the date aforesaid. The jurisdiction of the court is invoked under 28 U.S.C. and 1257 (3).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. The Fifth Amendment to the Constitution of the United States provides in pertinent parts:

> "No person shall...be deprived of life, liberty, or property, without due process of law."

2. The Sixth Amendment to the Constitution of the United States provides in pertinent parts:

"In all criminal prosecution, the accused shall enjoy the right...to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor and to have the assistance of counsel for his defense."

3. The Fourteenth Amendment to the Constitution of the United States provides in pertinent parts:

"No state shall make or enforce any law which shall abridge...any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

4. Louisiana Code of Criminal Procedure Article 716(B) provides.

"B. Upon Motion of the defendant, the court shall order the district attorney to inform the defendant of the existence, but not the contents, or any oral confession or statement of any nature, made by the defendant, which the district attorney intends to offer in evidence at the trial, with the information as to when, where and to whom such oral confession or statement was made.

C. Upon motion of the defendant, the court shall order the district attorney to inform the defendant of the substance of any oral statement which the state intends to offer in evidence made by the defendant, whether before or after arrest, in response to interrogation by any person then known to the defendant to be a law enforcement officer."

5. Louisiana Code of Criminal Procedure Article 841 provides in pertinent parts:

"The requirement of an objection shall not apply to the court's ruling on any written motion."

STATEMENT

(1) STATEMENT OF FACTS:

The facts relevant to the questions presented by the Petitioner are that Petitioner was convicted on February 10, 1979, of second degree murder in violation of R.S. 14:30.1. Within weeks after conviction, trial counsel was discharged and appellate counsel was engaged to represent Petitioner in all post-conviction proceedings. The Louisiana Supreme Court, on original hearing, reversed the conviction and granted Defendant a new trial. The court, on the State's rehearing motion, reversed and affirmed the conviction.

The Louisiana Supreme Court's summary of the facts is reported in State v. Naas, 409 So.2d 535, beginning at Page 538:

> "The victim was a resident of the New Orleans area and had been in Monroe on business. At the time of his death, he was engaged to be married to Ms. Amanda Keller, also of the New Orleans area. Ms. Keller had previously dated the defendant, Richard Naas, but had broken off her relationship with him. On March 4, 1978, several days before the murder, Ms. Keller announced to the defendant her plans to marry Mirambell.
>
> The state's case against defendant consisted of the following: the testimony of several witnesses that the defendant several days after the homicide had a black eye, suggestive of the possibility that shortly before, he was involved in some sort of fracas, or struggle; a money clip found in possession of the defendant which several witnesses said was similar to one owned by the victim; the testimony of one Mary Kelly, a waitress at Monroe's Kokomo Restaurant, who identified the defendant as

having been present in that establishment on the evening prior to the murder; the testimony of Sylvester Grant, a cellmate of the defendant following defendant's arrest for the instant crime, that the defendant admitted committing the Ramada Inn murder; the testimony of the victim's mother, sister, and receptionist that they had received telephone calls shortly before the murder from an unknown male inquiring concerning the whereabouts of the victim; and the testimony of Amanda Keller's roommate that she had received a call from the defendant on the night of the murder which in her opinion sounded as if it was being made long distance."

(2) SUMMARY OF LOUISIANA SUPREME COURT OPINION AND REHEARING OPINION:

In new trial motions and the resultant hearing, Petitioner discovered impeachment testimony relative to the testimony of the State's key witness, Sylvester Grant. This consisted of testimony from cell mates of Sylvester Grant that he, Sylvester Grant, admitted to being involved in the homicide for which the Defendant was indicted and convicted. If presented at trial, it would have seriously impeached Sylvester Grant's trial testimony. The Louisiana Supreme Court initially reversed the conviction. This was on June 22, 1981. The court gave the following reasons as a basis for reversal found at Pages 540 and 541:

"However, because in our view the single most damaging piece of evidence against defendant was Sylvester Grant's account of the defendant's admission of guilt, we hold that the impeaching testimonies of Kenneth Walker and Johnny Jackson are evidence which, if given at trial, would have cast serious doubt upon the credibility of Grant and would probably have changed the verdict or judgment of guilty. C.Cr.P. art. 851(3).

We need not find that Grant probably committed the murder, rather than defendant. Rather, it suffices that these accounts of Grant's own confessions strongly impeach Grant's testimony.

> Our holding with regard to newly discovered evidence requires that such evidence '...not withstanding the exercise of reasonable diligence by the defendant, was not discovered before or during trial.' C.Cr.P. art. 851(3)" At Page 540, see Appendix A infra.

> "In summary, Kenneth Walker's and Johnny Jackson's recitals that Grant had confessed his own commission of the Mirambell murder was discovered after the verdict of guilty; that late discovery came about notwithstanding the exercise of reasonable diligence on the part of the defendant; and had such evidence been introduced at the trial it would probably have changed the verdict of guilty. Therefore, defendant is entitled to a new trial. C.Cr.P. art. 851." At Page 541, see Appendix A infra.

On rehearing the Supreme Court reconsidered its original opinion, reversed and affirmed the conviction. At Page 543, the court held:

> "Upon a careful reexamination of the testimony adduced at the hearing on the motion for a new trial, we are of the opinion that our initial determination to order a new trial under C.Cr.P. 851(3) was erroneous."

* * *

> "We hold that defendant failed to show that his testimony is so material that it ought to produce a different result."

(3) STATEMENT OF FACTS APPLICABLE TO ALL QUESTIONS PRESENTED FOR REVIEW:

The Defendant was indicted on March 30, 1978, and arraigned on April 10, 1978, at which time he appeared with retained counsel and tendered a not guilty plea. His Sixth Amendment right to counsel attached at this time. On April 25, 1978, one Sylvester Grant was placed in the same cellblock with Petitioner. Sylvester Grant was later determined to be an informant.

This individual then proceeded to elicit from Petitioner information concerning the homicide. The facts further show that Sylvester Grant was taken out of the cellblock on one or more occasions, and reported to the detectives investigating the case. Sylvester Grant testified Petitioner gave oral inculpatory statements to him. The State failed to reveal the existence of these oral inculpatory statements notwithstanding a discovery motion and the mandatory requirement of Louisiana Code of Criminal Procedure Article 716(B), until the first day of trial. The Defendant contends the statement was never made to Sylvester Grant.

The Louisiana Supreme Court, in its original decision, classified the State's conduct in failing to disclose the evidence of the oral inculpatory statement as follows at Page 541:

> "In the defendant's argument relative to these assignments, it is correctly stated that the prosecution neglected its continuing duty to disclose, as set out in C.Cr.P. art. 729.3, by failing to apprise the defendant during the eight months prior to trial of the existence of Sylvester Grant's account of the defendant's confession. It is only because defendant did not object on these specific grounds to the introduction of Grant's statement at trial that we do not reverse the conviction on the basis of this egregious omission by the state."

On rehearing, at Page 544, the court again found error by the State's failure to disclose, stating:

> "In conjunction with our original holding, we noted that the state violated its continuing duty to disclose, as required by C.Cr.P. 729.3, by omitting to inform the defense of Naas' inculpatory statements to Grant. We did not reverse on this ground, however, finding that no objection to the introduction of Grant's testimony on the ground that the prosecution ignored the mandate of C.Cr.P. 729.3 was raised at trial. By not objecting, the defense eliminated the possibility of imposition of the sanctions enumerated

in C.Cr.P. 729.5 as a means to rectify any inequity created by the state's noncompliance. We affirm our holding that defendant cannot challenge the state's noncompliance because he failed to object."

Petitioner's counsel did object, but did not use the required language in making the objection. Petitioner filed a Motion For Bill of Particulars and a Motion For Oyer prior to trial requesting disclosure of any inculpatory statements. The State simply never filed supplemental discovery responses disclosing the evidence when it came into the possession of the State. Objections were lodged to the nondisclosure in numerous post-conviction motions. Further, Louisiana Code of Criminal Procedure Article 841 provides, "The requirement of an objection shall not apply to the court's ruling on any written motion." The trial court ruled the State's reply to the discovery motion was satisfactory for the reason that at the time the State initially replied, the evidence of oral inculpatory statements had not yet come into the possession of the State. The State thus failed to disclose material evidence which it was mandated to disclose in clear violation of Louisiana Law and of minimal due process.

(4) FURTHER STATEMENT OF FACTS APPLICABLE TO QUESTIONS (2), (3) & (5):

Petitioner sought in new trial motions and hearing to establish Sylvester Grant was a paid informant. Petitioner was not able to establish this by direct evidence, but contends it was established by circumstantial evidence. Petitioner was not able to post a bond until June 5, 1978. Petitioner's bond was $100,000.00. Sylvester Grant, the informant, was incarcerated initially on five (5) felony charges consisting of four forgery offenses and one bail bond jumping charge. On the same day Petitioner was released, Sylvester Grant was released on a reduced bond of $500.00 although he had a prior felony record

and had five pending felony charges. Petitioner was convicted on February 10, 1979. On February 16, 1979, less than a week after trial, all felony charges were dismissed against Sylvester Grant. This witness testified no promises were made to him in return for his testimony. Petitioner contends the fact of dismissal of five pending felony charges against a defendant with a felony record, and history of criminal conduct circumstantially must show the existence of an agreement granting lenient treatment, or immunity, to Sylvester Grant in return for his testimony. This was not disclosed to Petitioner. Petitioner avers Sylvester Grant therefore testified falsely when questioned as to the inducements offered in return for his trial testimony. The State never satisfactorily explained why the five (5) felony charges were dismissed. Petitioner states that this constitutes evidence patent on the face of the record that an undisclosed agreement existed between the State and the State's key witness, Sylvester Grant; otherwise, why the complete dismissal.

(5) STATEMENT OF FACTS APPLICABLE TO QUESTION (4):

The Petitioner presented alibi evidence that he was in New Orleans, Louisiana, on the date of the homicide, namely March 7, 1978, and early morning of March 8, 1978. The autopsy report showed the decedent died on the early morning hours of March 8, 1978. The alibi testimony placed the Petitioner in the Pitt Grill, New Orleans, Louisiana, between 1:30 a.m. and 3:00 a.m. on the morning of the homicide, March 8, 1978. Other testimony from two defense witnesses places the Petitioner in New Orleans, Louisiana, on March 7, 1978, between 5:00 p.m. and 8:00 p.m. A summary of their alibi testimony clearly shows that Petitioner was in New Orleans, Louisiana, at 8:00 p.m. on March 7, 1978, and was again seen between 1:30 a.m. and 3:00 a.m. the following morning which was March 8, 1978, and 300

miles from the site of the homicide. Petitioner contends the State failed to fully reveal the evidence of other alibi testimony which placed the Defendant in New Orleans, Louisiana, on the evening and early morning of March 7, 1978, and March 8, 1978. This evidence was discovered in post-conviction proceedings, and consisted of the testimony of A. J. Doming and Trudy Doming. Their testimony would have established Petitioner was in a lounge where they worked on the evening of March 7, 1978 at approximately 10:00 p.m. The name only of Trudy Doming, formerly Dufrene, was disclosed, but not her alibi statement; therefore, the full extent of the alibi testimony was never disclosed, nor the name of A. J. Doming. The State had this evidence eight months prior to the trial date.

SUMMARY OF FACTS RELATIVE TO RAISING OF FEDERAL QUESTIONS SOUGHT TO BE REVIEWED BY THIS COURT:

Petitioner presents five questions seeking review by this court on the basis of alleged constitutional violations. A summary of those five questions concerns three principal areas. The first area is the right and entitlement of Petitioner to disclosure of oral inculpatory statements made by Petitioner. This issue was raised by pretrial Motion For Bill of Particulars, Motion For Prayer of Oyer, Motion For Production of Prosecution Witnesses, and Discovery Order of June 21, 1978, found respectively in the trial court record at TR 29, TR 35-37, TR 70, and TR 70; and Notes of Evidence, April 27, 1978, June 13, 1978, and June 21, 1978. On appeal, this issue was raised in Assignment of Error 2(A), 3, 4, 8, 32, 33, 34, 37, 38, 39, 41, 52, and 53.

Second, Petitioner asserts denial of his rights under the Sixth Amendment to confrontation, cross-examination of wit-

nesses, and right to counsel. The issues relative to the Sixth Amendment claim were raised in Assignment of Errors 32, 35, 36, 52 and 53. Further, in renumbered Assignment of Error 40(A) and in two (2) post-conviction Motions for New Trial cited in the following paragraph.

Finally, Petitioner's claim that exculpatory evidence was not disclosed to Petitioner was raised in the trial court by the filing of motion styled FIRST SUPPLEMENTAL MOTION FOR NEW TRIAL PURSUANT TO ARTICLE 851(3) & (4), and motion styled FOURTH SUPPLEMENTAL MOTION FOR NEW TRIAL PURSUANT TO ARTICLE 851(3). Further, in Assignment of Errors 2, 8, 28, 30, 40(A), 42, 44, 50 and 51.

ARGUMENT AND REASONS FOR GRANTING THE WRIT

(1) THE STATE COURT BELOW HAS DECIDED A FEDERAL CONSTITUTIONAL QUESTION OF IMPORTANCE TO THE ADMINISTRATIONOF JUSTICE RELATIVE TO THE NONDISCLOSURE BY THE STATE OF ORAL INCULPATORY STATEMENTS MADE BY THE DEFENDANT:

Petitioner contends the failure by the State, and its deliberate, deceitful and knowing acts in not disclosing the existence of the oral inculpatory statements, where the State intended to use, and did use, said statements at trial, offends fundamental principles of minimal due process. Louisiana Code of Criminal Procedure Article 716(B) mandates disclosure as does the decision of State v. Joseph, 379 So.2d 1076 (1980), decided by the Louisiana Supreme Court. The various arguments on the issue are stated in U.S. v. Narcisco, 446 F. Supp. 252 (E.D. Mich, 1976) at Pages 266-67:

"There is some judicial opinion in support of the defendants' position. The most detailed analysis of the problem is found in U.S. v. Feinberg, 371 F.Supp. 1205 (N.D. Ill. 1974); rev'd. in part 502 F.2d 1180 (7th Cir. 1974); cert. denied, 420 U.S. 926, 95 S.Ct. 1122, 43 L.Ed. 2d 396 (1975). In Feinberg the trial judge faced the identical issue presented here and determined that the literal interpretation of the rule, and the one most consistent with its purpose, was that 'disclosure may be ordered of statements made by a defendant regardless of to whom they were made.' U.S. v. Feinberg, supra, at 1211. Aside from the language of the rule itself, the district court's opinion notes that one of the purposes of the rule is to apprise the defendant of statements he may not always be aware of which are in the possession of the government.

This approach to the problem has found favor elsewhere. U.S. v. Walk, 533 F.2d 417 (9th Cir. 1975) (dissenting opinion); U.S. v. Morrison, 43 F.R.D. 516 (N.D. Ill. 1967); U. S. v. Baker, 262 F. Supp. 657, 671-2 (D.D.C. 1966). See also views of Representatives Holtzman and Drinan. H.R. 94-247, 1974 U.S. Code Cong. and Admin. News, 706.

The government's position finds support in U.S. v. Walk, supra; U.S. v. Pollack, 175 U.S. App. D.C. 227, 534 F.2d 964 (1976). These decisions read the Rule to limit such statements to those obtained by the government directly from the defendant and not through any third party. The rationale of these cases is (1) consistency with the Jencks Act, and (2) avoidance of the possibility of revealing statements that are too far removed from the supposed source to be reliable.

The intermediate position is that while statements made by defendants to third persons, not agents of the government, may come within the amit of the rule, they are discoverable only as provided for by the Jencks Act, 18 U.S.C. (3500). U.S. v. Callahan, 534 F.2d 763 (7th Cir. 1976); U.S. v. Feinberg, 502 F.2d 1180; U.S. v. Kenny, 462 F.2d 1205 (3rd Cir. 1972); U.S. v. Pastor, 419 F.

Supp. 1318 (S.D.N.Y. 1976); U.S. v. Smith, 405 F.Supp. 144 (E.D.Pa. 1975); U.S. v. Dorfman, 53 F.R.D. 477 (S.D.N.Y. 1971), aff'd. 470 F.2d 246 (2d Cir. 1972). This approach is bottomed on F.R.Cr.P. 26(a) (2) which provides that 'statements made by government witnesses or prospective government witnesses' may not be discovered except as provided for in the Jencks Act. It is premised on the desire of Congress to protect potential witnesses from threats of bribery or coercion and to protect government files against unwarranted and excessive intrusions. U.S. v. Walk, supra; U.S. v. Feinberg, 502 F.2d 1180, supra."

446 F. Supp. at 266-67 (footnotes omitted). The court concluded:

> "In light of the foregoing, the Court concludes that Rule 16(a)(1)(A) does encompass statements made by the defendants, regardless of to whom they were made. However, the Jencks Act governs the discoverability of such statements as were made to government witnesses. As to statements made to persons not government witnesses, known to the government, those statements are discoverable. If the government is aware of any such statements not recorded on the non-witness 302 forms that have been turned over to the defense counsel, it is hereby ordered to provide these forthwith. As to such third party statements in the possession of the government of prospective witnesses, the government is ordered to provide the defense, forthwith, with
>
> 1. The fact of such a statement;
> 2. Whether a recordation of such statement exists in any form whatsoever;
> 3. The name and address of the individual to whom the statement was made; and
> 4. The date on which and place where the statement was made.
>
> These orders are made under the Court's discretionary power to control the discovery granted under Rule 16."

Id. at 267 (footnotes omitted).

(2) THE STATE COURT BELOW HAS DECIDED A FEDERAL QUESTION NOT IN ACCORDANCE WITH APPLICABLE DECISIONS OF THIS COURT RELATIVE TO PETITIONER'S SIXTH AMENDMENT RIGHT TO COUNSEL, RIGHT OF CONFRONTATION, AND RIGHT TO EFFECTIVE CROSS-EXAMINATION:

The facts clearly show the State placed Sylvester Grant, its key, and only witness who gave substantial testimony against the Defendant, in the same cell block with Petitioner, with direct instructions to elicit information. This was after indictment and after arraignment. The State failed to disclose the existence of the oral inculpatory statements allegedly made to Sylvester Grant until trial.

First, Petitioner claims denial of the right of confrontation and effective cross-examination. The ploy of the State was to wait until the first day of trial, then by surprise, notify the defendant of the existence of statements which the defendant was totally unaware prior to that point. No lawyer or advocate could have prepared properly at that point, and under such adverse circumstances.

In Davis v. Alaska, 415 U.S. 308, 94 S.Ct. 1105, 39 L.Ed. 2d 347 (1974), the U.S. Supreme Court stated at Page 1110:

> "The Sixth Amendment to the Constitution guarantees the right of an accused in a criminal prosecution 'to be confronted with the witnesses against him.' This right is secured for defendants in state as well as federal criminal proceedings under Pointer v. Texas, 380 U.S. 400, 85 S.Ct. 1065, 13 L.Ed.2d 923 (1965). Confrontation means more than being allowed to confront the witness physically. 'Our cases construing the (confrontation) clause hold

that a primary interest secured by it is the right of cross-examination.' Douglas v. Alabama, 380 U.S. 415, 418, 85 S.Ct. 1074, 1076, 13 L.Ed. 2d 934 (1965). Professor Wigmore stated:

> "The main and essential purpose of confrontation is to secure for the opponent the opportunity of cross-examination.
>
> The opponent demand confrontation, not for the idle purpose of gazing upon the witness, or of being gazed upon by him, but for the purpose of cross-examination, which cannot be had except by the direct and personal putting of questions and obtaining immediate answers." (Emphasis in original.) 5J. Wigmore, Evidence (1935), p. 123 (3d ed. 1940) (footnotes omitted). Page 1110."

The essence of effective cross-examination is to determine believability, and the testing of the testimony of the witnesses. If the witness is unknown, and the defendant is surprised by the testimony, there can be no effective cross-examination effort by counsel. Defendant submits the error to be reversible and of constitutional dimension.

Second, this court's decision of Massiah v. U.S., 377 U.S. 201, 84 S.Ct. 1199, 12 L.Ed.2d 246 (1964) and U.S. v. Henry, 447 U.S. 264, 100 S.Ct. 2183, 65 L.Ed.2d 115 (1980) are violated by the State's decision. In Massiah, this court stated at Page 1202:

> "Any secret interrogation of the defendant, from and after the finding of the indictment, without the protection afforded by the presence of counsel, contravenes the basic dictates of fairness in the conduct of criminal causes and the fundamental rights of persons charged with crime."

Further, the court at Page 1203, in finding a violation of the Sixth Amendment Right to Counsel, stated:

> "We hold that the petitioner was denied the basic protection of that guarantee when there was used against him at his trial evidence of his own incriminating words, which federal agents had deliberately elicited from him after he had been indicted and in the absence of his counsel."

In Henry, this court held at Page 2189:

> "By intentionally creating a situation likely to induce Henry to make incriminating statements without the assistance of counsel, the government violated Henry's Sixth Amendment right to counsel. This is not a case where, in Justice Cardozo's words, 'the constable blundered,' People v. DeFore, 242 N.Y. 13, 21, 150 N.E. 585, 587 (1926); rather it is one where the 'constable' planned an impermissible interference with the right to the assistance of counsel."

Petitioner strenuously urges the court to consider the facts in HENRY as being quite similar to the facts in NAAS. The only distinction the State could make is that the record in HENRY reflected the informant to have received money for obtaining the information, and thereby, would be classified as a paid informant. The record in NAAS reflects that the informant, Sylvester Grant, received a similar consideration, or remuneration, that being his liberty. All charges were dismissed. This must create a circumstantial presumption of an immunity grant and/or a promise in return for his testimony. The defense submits reversible error in violation of Petitioner's rights under the Sixth Amendment concerning the conversations between the State's informant, Sylvester Grant, and Petitioner, even though the trial court rule inadmissible a portion of these conversations.

(3) THE STATE COURT BELOW DECIDED A FEDERAL QUESTION NOT IN ACCORDANCE WITH APPLICABLE DECISION OF THIS COURT RELATIVE TO PETITIONER'S DUE PROCESS RIGHTS AS TO DISCOVERY OF EXCULPATORY EVIDENCE:

The State received information from detectives investigating the case that one A. J. Doming and Trudy Doming, then Trudy Dufrene, could provide testimony in support of Petitioner's alibi defense. The State disclosed only the name of Trudy Doming, not the additional name of A. J. Doming. Further, in its limited disclosure, it did not furnish details relative to the alibi statements. This evidence was clearly exculpatory.

All charges against the State's key witness, Sylvester Grant, were dismissed after he testified against Petitioner and within one week. The State has not explained, nor given a reason why. This creates a circumstantial presumption patent on the record that a grant of immunity, or plea agreement, was extended to Sylvester Grant in exchange for his testimony. This evidence was required to be disclosed, or explained. It certainly has been considered exculpatory by this court in prior decisions.

In Brady v. Maryland, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed. 215 (1963) at Page 1193, this court stated.

> "We now hold that the suspension by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilty or to punishment, irrespective of the good faith or bad faith of the prosecution."

Later, in U.S. v. Agurs, 427 U.S. 97, 96 S.Ct. 2392, 49 L.Ed. 342 (1976), at Pages 2401-2402 this court held:

> "The proper standard of materiality must reflect our overriding concern with the justice of the finding of guilt. Such a finding is permissible only if supported by evidence establishing guilty beyond a reasonable doubt. It necessarily follows that if the omitted evidence creates a reasonable doubt that did not otherwise exist, constitutional error has been committed. This means that the omission must be evaluated in the context of the entire record. If there is no reasonable doubt about guilt whether or not the additional evidence is considered, there is no justification for a new trial. On the other hand, if the verdict is already of questionable validity, additional evidence of relatively minor importance might be sufficient to create a reasonable doubt."

A specific request for exculpatory material was made by Petitioner. The response of the prosecution did not comply with the rules relative to disclosure. Finally, if Petitioner's request was considered as a general request, then the test becomes whether the evidence suppressed and not disclosed, had it been disclosed and offered at trial, would have created reasonable doubt that otherwise did not exist concerning the guilt of Petitioner. Exculpatory alibi evidence would create such a doubt. The fact that the State made an agreement with Sylvester Grant in exchange for his testimony would have created such a doubt.

CONCLUSION

It is respectively submitted that the Writ of Certiorari should be granted.

Respectfully submitted,

JAMES D. SPARKS, JR.
ATTORNEY FOR PETITIONER
P. O. Box 4268
1203 Royal Avenue
Monroe, LA 71201
Tel. No. (318) 387-6573

CERTIFICATE OF SERVICE

The undersigned has made application to this court for admission to practice before this court, and certifies that pursuant to Rule 28, Supreme Court Rules, service of this Petition for Writ of Certiorari to the Supreme Court of Louisiana has been made on counsel for Respondent by enclosing three copies thereof in an envelope addressed to:

J. Carl Parkerson
District Attorney
Fourth Judicial District Court
300 St. John Street
Monroe, LA 71201

and depositing same in the United States mail, postage prepaid, at Monroe, Louisiana on April 19, 1982; and further certifies that all parties required to be served have been served.

JAMES D. SPARKS, JR.

Appendix

Appendix A

SUPREME COURT OF LOUISIANA

June 22, 1981

STATE OF LOUISIANA

VERSUS No. 80-KA-2446

RICHARD GLEN NAAS

On Appeal from the Fourth Judicial District Court,
Parish of Ouachita,
Honorable John R. Joyce, Judge.

CALOGERO, Justice

Richard Glen Naas was charged by bill of indictment on March 30, 1978, with second degree murder, a violation of R.S. 14:30.1 Trial was held before a jury of twelve and a conviction was returned by an eleven to one vote. The court imposed a sentence of life imprisonment at hard labor without probation or suspension of sentence, and without parole eligibility for forty years. Defendant appeals his conviction to this Court on the basis of numerous assignments of error.

At trial, the following facts were adduced. In the early morning hours of March 8, 1978, officers of the Monroe Police Department were called by the manager of the local Ramada Inn to investigate a possible homicide at that motel. Upon entering room 428, the officers discovered the body of the victim, John J. Mirambell, Jr., submerged in the bathtub. The victim's hands were tied behind his back and, according to the patholo-

gist's report, the victim had received multiple cuts, bruises, and lacerations, along with two non-fatal stab wounds to the back and a fatal gunshot wound to the left temple.

The victim was a resident of the New Orleans area and had been in Monroe on business. At the time of his death, he was engaged to be married to Ms. Amanda Keller, also of the New Orleans area. Ms. Keller had previously dated the defendant, Richard Naas, but had broken off her relationship with him. On March 4, 1978, several days before the murder, Ms. Keller announced to the defendant her plans to marry Mirambell.

The state's case against defendant consisted of the following: the testimony of several witnesses that the defendant several days after the homicide had a black eye, suggestive of the possibility that shortly before, he was involved in some sort of fracas, or struggle; a money clip found in possession of the defendant which several witnesses said was similar to one owned by the victim; the testimony of one Mary Kelly, a waitress at Monroe's Kokomo Restaurant, who identified the defendant as having been present in that establishment on the evening prior to the murder;[1] the testimony of Sylvester Grant,

---

1. Mary Kelly's identification of defendant is questionable in light of a photographic show-up to which Ms. Kelly was initially exposed. In defendant's assignment of error No. 26, which we do not reach, the identification is challenged as a product of the unduly suggestive show-up. As evidence of suggestiveness, defendant cites that a single photo was shown to the witness, instead of a group of photos from which the witness would be allowed to pick one recognizable to her, and that the sole photo was further highlighted by its depicting defendant's black eye.

a cellmate of the defendant following defendant's arrest for the instant crime, that the defendant admitted committing the Ramada Inn murder; the testimony of the victim's mother, sister, and receptionist that they had received telephone calls shortly before the murder from an unknown male inquiring concerning the whereabouts of the victim; and the testimony of Amada Keller's roommate that she had received a call from the defendant on the night of the murder which in her opinion sounded as if it was being made long distance.

Because we find merit in defendant's assignment of error number 40-A, pertaining to the Motion for New Trial, and reverse on that grounds, discussion of defendant's other assignments of error is unnecessary.

In connection with defendant's Motion for New Trial, a post-trial hearing was conducted at which pertinent testimony from the following witnesses was given: Gene Juergens, who was a co-worker of defendant, stated that he had informed Detective Cummings upon being asked by the officer to inspect a money clip seized from the defendant's apartment that the clip appeared to be the one belonging to the defendant;[2] Paul Scoriels, an acquaintance of defendant, testified that he had seen defendant at the Jefferson Parish Courthouse on

---

2. Among the items of evidence offered by the state at trial was that money clip taken from the possession of the defendant some days after the homicide, along with the testimony of several witnesses that the clip was very similar to one which they had known the victim to carry.

Monday, March 6, 1977, one day before the murder, and had at that time observed defendant to be sporting a mustache; [3]Kenneth Walker and Johnny Jackson, both former cellmates of Sylvester Grant and of defendant, testified that they heard Grant brag repeatedly that he himself had committed the homicide at the Ramada Inn; Connie Naas, defendant's ex-wife, stated that the money clip taken by police from the defendant's apartment was a gift to defendant from his employer in New Orleans some years prior to the homicide; Trudy Dufrene, a waitress at the Round Table Lounge in Gretna, Louisiana, testified that she had told police a week after the murder that she saw defendant in the Round Table between 8:30 and 10:00 p.m. on Tuesday, March 7, 1978.[4]

---

3. This evidence tends to discount the testimony of the state's witness, Mary Kelly, the waitress who stated at trial that she served the defendant in the Kokomo Restaurant in Monroe on the evening of the murder. Kelly claims that the man she served was clean-shaven. Scoriels' testimony, coupled with the photographs of the defendant taken by police several days after the crime clearly showing the defendant to have a mustache, casts doubt on Kelly's identification.

4. Since the homicide took place in the very early morning hours of Wednesday, March 8, 1978, Ms. Dufrene's testimony casts doubt on whether defendant could have been in Monroe in time to commit the crime.

The law pertaining to the granting of Motions for New Trial is set out in C.Cr.P. art. 851, which provides:

> "The motion for a new trial is based on the supposition that injustice has been done the defendant, and, unless such is shown to have been the case the motion shall be denied, no matter upon what allegations it is grounded.
>
> The court, on motion of the defendant, shall grant a new trial whenever:
>
> (1) The verdict is contrary to the law and the evidence;
>
> (2) The court's ruling on a written motion, or an objection made during the proceedings, shows prejudicial error;
>
> (3) New and material evidence that, notwithstanding the exercise of reasonable diligence by the defendant, was not discovered before or during the trial, is available, and if the evidence had been introduced at the trial it would probably have changed the verdict or judgment of guilty;
>
> (4) The defendant has discovered, since the verdict or judgment of guilty, a prejudicial error or defect in the proceedings that, notwithstanding the exercise of reasonable diligence by the defendant, was not discovered before the verdict or judgment; or
>
> (5) The court is of the opinion that the ends of justice would be served by the granting of a new trial, although the defendant may not be entitled to a new trial as a matter of strict legal right."

Defendant's motion is grounded on C.Cr.P. art. 851(3). It is urged that the testimony offered post-trial constitutes new and material evidence, which was not discovered before or during trial, defendant's diligence notwithstanding, and which would probably have changed the verdict. The motion is further based on C.Cr.P. art. 851(4), the defendant's position being that a newly discovered error or defect is present by reason of the state's knowledge of and failure to disclose the statements of Gene Jurgens and Trudy Dufrene, which statements are arguably exculpatory in nature.[5]

While defendant's claims as they relate to C.Cr.P. art. 851(4) and to the Brady motions are not entirely without merit, the state's failure to disclose the arguably exculpatory statements was not "prejudicial error" as would be required by the statute. Furthermore, the new evidence offered in the form of Paul Scoriels' testimony that defendant was in the Jefferson Parish Courthouse on March 6, 1978, while material and substantial, cannot conclusively be said to "probably have changed the verdict or judgment of guilty if introduced at trial." C.Cr.P. art. 851(3). However, because in our view the single most

---

5. Defendant's pre-trial Brady motion for exculpatory evidence was answered by the state without reference to this particular aspect of the statement of Gene Jurgens (referring to Jurgens' identification of the money clip as one similar to one belonging to the defendant). See Brady v. Maryland, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963). However, the record reveals that the statement of Trudy Dufrene establishing defendant's alibi was noted by the state in paragraph 9-10 of its Answer to Motion for Bill of Particulars, filed April 26, 1978.

damaging piece of evidence against defendant was Sylvester Grant's account of the defendant's admission of guilt, we hold that the impeaching testimonies of Kenneth Walker and Johnny Jackson are evidence which, if given at trial, would have cast serious doubt upon the credibility of Grant and would probably have changed the verdict or judgment of guilty.[6] C.Cr.P. art. 851(3).

We need not find that Grant probably committed the murder, rather than defendant. Rather, it suffices that these accounts of Grant's own confessions strongly impeach Grant's testimony.

Our holding with regard to newly discovered evidence requires that such evidence "...notwithstanding the exercise of reasonable diligence by the defendant, was not discovered before or during trial." C.Cr.P. art. 851(3). Discussion of the defendant's reasonable diligence requires mention of another of his arguments to this Court, namely, the one dealing with the pre-trial Prayer for Oyer.[7]

---

6. The record also indicated that Sylvester Grant had been previously convicted of Forgery in an Arkansas court, and that pending against him at the time of trial were three counts of Forgery and one count each of Theft and Bond Jumping. Further, there is evidence that all charges against Grant were dismissed in the state court after defendant Naas' conviction. Prosecution was taken up in the Monroe City Court where Grant drew a total of forty days imprisonment of all of the above mentioned charges.

7. This first of defendant's arguments deals with assignments of error numbers 2A, 3, 8, 32, 33, 34, 35, 36, 37, 38, 39, 41, 52, and 53.

The defense, in preparation for trial, made a Motion for Prayer for Oyer toward the end of April, 1978. The motion was granted by the trial judge under C.Cr.P. art. 716B[8] in response to a prayer asking "...the state to furnish (defendant) copies of all oral, taped and/or written confessions, statements, and/or admissions allegedly made by the Defendant either before or after his arrest for the alleged offense for which he is charged herein." On April 26, 1978, the state answered the prayer with a transcript of the recording of a statement made by the defendant to the police.[9] Sylvester Grant was placed in the Ouachita Parish Jail with defendant on May 25, 1978, and approached the police with his account of defendant's confessions on June 2, 1978. At that time, Grant's statement was recorded and transcribed as was a similar statement made by him to police several days later, on June 5th.[10] Testimony of

---

8. C.Cr.P. art. 716B reads:
"Upon motion of the defendant, the court shall order the district attorney to inform the defendant of the existence, but not the contents, of any oral confession or statement of any nature, made by the defendant, which the district attorney intends to offer in evidence at the trial, with the information as to when, where and to whom such oral confession or statement was made."

9. In the transcript furnished to the defense, defendant made numerous statements denying his involvement in the murder.

10. The second of Grant's statements was ruled inadmissible at trial.

witnesses at trial indicate that the District Attorney was made aware of the content of both of Grant's statements within a week of their having been made to the police. The defense was not informed of the existence of this purported confession made by defendant to Grant until February 5, 1979, the very first day of trial, when the state in accordance with C.Cr.P. art. 768[11] related its intention to use the statement at trial.

C.Cr.P. art. 729.3 provides:

> "If, subsequent to compliance with an order issued pursuant to this Chapter and prior to or during trial, a party discovers additional evidence or decides to use additional evidence and such evidence is or may be, subject to discovery or inspection under the order issued, he shall promptly notify the other party and the court of the existence of the additional evidence, so that the court may modify its previous order or allow the other party to make an appropriate motion for additional discovery or inspection."

In the defendant's argument relative to these assignments, it is correctly stated that the prosecution neglected its continuing duty to disclose, as set out in C.Cr.P. art. 729.3, by failing to apprise the defendant during the eight months prior to trial

---

11. C.Cr.P. art. 768 reads:
"If the state intends to introduce a confession or inculpatory statement in evidence, it shall so advise the defendant in writing prior to beginning the state's opening statement. If it fails to do so a confession or inculpatory statement shall not be admissible in evidence."

of the existence of Sylvester Grant's account of the defendant's confession. It is only because defendant did not object on these specific grounds to the introduction of Grant's statement at trial that we do not reverse the conviction on the basis of this egregious omission by the state.[12]

It is one thing to say that defendant cannot complain of the introduction of Grant's damning testimony because defen-

---

12. The reasoning of State v. Bonanno, 373 So.2d 1284 (La. 1979), is applicable to the instant case. In Bonanno, a petitioner who had failed to object at trial to the state's non-compliance with the discovery statutes was estopped from complaining on appeal because petitioner by his silence had deprived the trial judge of the chance to rectify the inequity by application of the sanctions of C.Cr.P. art. 729.5, which provides in pertinent part:

> "A. If at any time during the course of the proceedings it is brought to the attention of the court that a party has failed to comply with this Chapter or with an order issed pursuant to this Chapter, the court may order such party to permit the discovery or inspection, grant a continuance, order a mistrial on motion of the defendant, prohibit the party from introducing into evidence the subject matter not disclosed, or enter such other order, other than dismissal, as may be appropriate.
>
> * * * (Emphasis provided)

In the instant case, the defendant's timely objection on appropriate grounds would have afforded the court the opportunity to have excluded the introduction of Grant's testimony at trial.

dant did not object on the appropriate grounds. It is entirely another, however, for this Court to find that defendant's lack of diligence caused him not to discover before conclusion of trial the witnesses who would later impeach Grant, in a situation where the state has withheld whether intentionally or negligently, until the first day of trial, information which for eight months they had a duty to disclose.[13] On the contrary, we find that defendant's late discovery of the evidence was not the result of any lack of diligence on his part.

In summary, Kenneth Walker's and Johnny Jackson's recitals that Grant had confessed his own commission of the Mirambell murder was discovered after the verdict of guilty; that late discovery came about notwithstanding the exercise of reasonable diligence on the part of defendant; and had such evidence been introduced at the trial it would probably have changed the verdict of guilty. Therefore, defendant is entitled to a new trial. C.Cr.P. art 851.

Decree

For these reasons we hold that the trial court should have granted defendant's Motion for New Trial. Accordingly, the conviction is reversed and the case is remanded for a new trial.

REVERSED; REMANDED; NEW TRIAL ORDERED.

* * *

---

13. The evidence is that the District Attorney was aware of the testimony of Sylvester Grant no later than June of 1978. Defendant was first noticed of this testimony on the first day of trial, February 5, 1979.

Appendix B

SUPREME COURT OF LOUISIANA

No. 80-KA-2446

STATE OF LOUISIANA

Versus

December 14, 1981

RICHARD GLEN NAAS

ON REHEARING

DIXON, Chief Justice

We granted a rehearing in this case to reconsider our decision that the trial court should have granted defendant's motion for a new trial based on the testimony of two prisoners at the hearing of the motion which impeached the testimony of the state's key witness.

Defendant, Richard Glen Naas, was charged by bill of indictment with second degree murder in violation of R.S. 14:30.1. The jury returned a verdict of guilty and Naas was sentenced to life imprisonment at hard labor without probation or suspension of sentence, and without parole eligibility for forty years.

We adopt the facts as recited in our original opinion:

In the early morning hours of March 8, 1978, officers of the Monroe Police Department were called by the manager of the local Ramada Inn to investigate a possible homicide at that motel. Upon entering Rm. 428, the officers discovered the body of the victim, John J. Mirambell, Jr., submerged in the bathtub. The victim's hands were tied behind his back and, according to the pathologist's report, the victim had received multiple cuts, bruises, and lacerations, along with two non-fatal stab wounds to the back and a fatal gunshot wound to the left temple.

The victim was a resident of the New Orleans area and had been in Monroe on business. At the time of his death, he was engaged to be married to Ms. Amanda Keller, also of the New Orleans area. Ms. Keller had previously dated the defendant, Richard Naas, but had broken off her relationship with him. On March 4, 1978, several days before the murder, Ms. Keller announced to the defendant her plans to marry Mirambell.

The state's case against defendant consisted of the following: the testimony of several witnesses that the defendant several days after the homicide had a black eye, suggestive of the possibility that shortly before, he was involved in some sort of fracas, or struggle; a money clip found in possession of the defendant which several witnesses said was similar to one owned by the victim; the testimony of one Mary Kelly, a waitress at Monroe's Kokomo Restaurant, who identified the defendant as having been present in that establishment on the evening prior to the murder; the testimony of Sylvester Grant,

a cellmate of the defendant following defendant's arrest for the instant crime, that the defendant admitted committing the Ramada Inn murder; the testimony of the victim's mother, sister, and receptionist that they had received telephone calls shortly before the murder from an unknown male inquiring concerning the whereabouts of the victim; and the testimony of Amada Keller's roommate that she had received a call from the defendant on the night of the murder which in her opinion sounded as if it was being made long distance.

A hearing was held in connection with defendant's motion for a new trial, at which the following testimony was given: Gene Juergens, who was a co-worker of defendant, stated that he had informed Detective Cummings upon being asked by the officer to inspect a money clip seized from the defendant's apartment that the clip appeared to be the one belonging to the defendant; Paul Scoriels, an acquaintance of defendant, testified that he had seen defendant at the Jefferson Parish Courthouse on Monday, March 6, 1977, one day before the murder, and had at that time observed defendant to be sporting a mustache; Kenneth Walker and Johnny Jackson, both former cellmates of Sylvester Grant and of defendant, testified that they heard Grant brag repeatedly that he himself had committed the homicide at the Ramada Inn; Connie Naas, defendant's ex-wife, stated that the money clip taken by police from the defendant's apartment was a gift to defendant from his employer in New Orleans some years prior to the homicide; Trudy Dufrene, a waitress at the Round Table Lounge in Gretna, Louisiana, testified that she had told police a week after the murder that she saw defendant in the Round Table between 8:30 and 10:00 p.m. on Tuesday, March 7, 1978.

ASSIGNMENTS OF ERROR NOS. 40 AND 40A

By these assignments, defendant argues that the testimony of Kenneth Walker and Johnny Jackson given at the hearing on the motion for a new trial constitutes new and material evidence sufficient to justify a new trial under C.Cr.P. 851(3). In our original opinion, we agreed with defendant and held that the impeachment testimony of Walker and Jackson would have cast serious doubt on the credibility of the state's key witness, Sylvester Grant, and would have probably changed the verdict.

Upon a careful reexamination of the testimony adduced at the hearing on the motion for a new trial, we are of the opinion that our initial determination to order a new trial under C.Cr.P. 851 (3) was erroneous. The test to be utilized is not simply whether another jury might bring in a different verdict, but whether the new evidence is so material that it ought to produce a different result than the verdict reached. State v. Provost, 352 So.2d 661 (La. 1977). In view of the questionable nature of "jailbird" testimony, we are of the belief that the trial court's denial of defendant's motion should not have been disturbed. Our original decision rested solely on the testimony of two cellmates, Walker and Jackson. We now believe that too much credence was given to and weight placed on their sketchy testimony. The substance of their testimony offered at the hearing was merely that Grant told them he committed a murder at some Ramada Inn. They were unable to provide any details or specific facts such as Grant's motive for the crime. Walker testified vaguely that Grant said somebody "was messing with his old lady or wife or something,...or cursed her or something." We hold that defendant failed to show that this testimony is so material that it ought to produce a different result.[1]

ASSIGNMENTS OF ERROR NOS. 2A, 3,
34, 37, 38, 39, 40,
41, 42, 44, 50, 51, 52 and 53

By these assignments, defendant urges that the state's failure to furnish notice of the existence and substance of oral inculpatory statements constitutes reversible error.[2] Defendant insists that the state's refusal to comply with discovery amounts to a prejudicial error or defect within the meaning of C.Cr.P. 851(4).[3] It is undisputed that the state failed to supply Naas with the name of its key witness, Sylvester Grant, despite a discovery order directed at such information, until the morning of trial. Aside from not disclosing Grant's name, the defense also contends that the state failed to inform it that two individuals, Trudy Dufrene and A. J. Doming, who were interviewed during the police investigation of the murder, had told police that they saw defendant in the New Orleans area on the night of the crime. This contention is partially erroneous. In the state's answer to defendant's motion for a bill of particulars, the state revealed the name and address of Trudy Dufrene and reported that Dufrene said she might have seen Naas on the night of the crime. Had defendant followed up on this information, the testimony of Dufrene, and probably that of her husband, Doming, would have been available at trial. Thus, this evidence does not satisfy the test of C.Cr.P. 851(4).

In conjunction with our original holding, we noted that the state violated its continuing duty to disclose, as required by C.Cr.P. 729.3, by omitting to inform the defense of Naas' inculpatory statements to Grant. We did not reverse on this ground, however, finding that no objection to the introduction of Grant't testimony on the ground that the prosecution ignored the mandate of C.Cr.P. 729.3 was raised at trial. By not

objecting, the defense eliminated the possibility of imposition of the sanctions enumerated in C.Cr.P. 729.5 as a means to rectify any inequity created by the state's noncompliance. We affirm our holding that defendant cannot challenge the state's noncompliance because he failed to object. See State v. Bonanno, 373 So.2d 1284 (La. 1979).

We now turn to other assignments raised by defendant in brief.

ASSIGNMENT OF ERROR NO. 1

By this assignment, the defense argues that C.Cr.P. 292 is unconstitutional in that it dispenses with the necessity of a preliminary hearing where the accused has been indicted. This court has held that C.Cr.P. 292 does not violate the due process requirement of the federal Constitution. See State v. Howard, 325 So.2d 812 (La. 1976). Nor is C.Cr.P. 292 violative of the Louisiana Constitution. See La. Const. art. 1 §14 (1974).

This assignment lacks merit.

ASSIGNMENT OF ERROR NO. 2

By this assignment, defendant urges that the state's failure to fully answer a bill of particulars constitutes reversible error. The purpose of a bill of particulars is to provide an accused with sufficient information as to the nature and cause of the offense with which he is charged. State v. Atkins, 360 So.2d 1341 (La. 1978), cert. denied 441 U.S. 927, reh. denied 442 U.S. 935; C.Cr.P. 484. Adequate information of the nature and cause of the accusation against defendant was supplied by the state.

This assignment lacks merit.

ASSIGNMENT OF ERROR NO. 5

By this assignment, defendant asserts that the trial judge erred in denying his motion for a change of venue on the ground that widespread publicity precluded an impartial trial in Ouachita Parish. In order to be entitled to a change of venue, the defendant must prove more than a mere knowledge by the public of facts surrounding the offense. State v. Baldwin, 388 So.2d 679 (La. 1980). The sole evidence offered by Naas at the hearing on this motion consisted of the testimony of a special investigator that there had been some media coverage of the murder and three newspaper clippings which reported the crime on the day of its occurrence and defendant's arrest. In view of the sparse showing of publicity, the trial court's ruling that defendant would not be prejudiced was not error.

This assignment lacks merit.

ASSIGNMENT OF ERROR NO. 4

By this assignment, defendant urges that the trial court erred in denying his motion to produce prosecution witnesses and witnesses beneficial to a defense. Defendant argues that he informed police officers of his whereabouts on the night of the crime and gave the names of persons who could verify his whereabouts and, therefore, he was entitled to the names of state witnesses under C.Cr.P. 727 (B). The trial court ruled that article 727 requires that the district attorney make written demand upon the defendant before the defendant is entitled to reciprocal discovery. The ruling is correct. No formal discovery had

been initiated by the state at the time defendant volunteered information concerning his whereabouts. The police were merely investigating the murder and had not as yet zeroed in on the defendant.

This assignment lacks merit.

ASSIGNMENT OF ERROR NO. 6

By this assignment, defendant asserts that the trial court erred in not holding a hearing on his motion to suppress a money clip and photographs taken of the crime scene. This assignment is without merit. The record indicates that a hearing was held on the motion at which it was shown that the money clip was taken from defendant's apartment pursuant to a consent to search form. The trial court's finding that C.Cr.P. 703 only applies to the suppression of evidence obtained by an unconstitutional search (and not to challenges of relevancy or prejudicial effect) was correct. Thus, defendant's objection to the photographs on these grounds was premature and properly raised at the trial when the state attempted to introduce them.

This assignment lacks merit.

ASSIGNMENTS OF ERROR NOS. 8 AND 28

Defendant argues that the state's failure to produce physical evidence constitutes error. The record is devoid of any objection by the defense urging that the state had failed to comply with the discovery request, nor was any objection raised at the trial to the evidence. A failure to object once the evidence is

offered constitutes a waiver of the objection. State v. Roussel, 381 So.2d 796 (La. 1980).

These assignments lack merit.

ASSIGNMENT OF ERROR NO. 7

By this assignment, defendant urges that the state's failure to comply with his motion to produce witnesses beneficial to the defense constitutes reversible error. The defense requested the production of the name and address of a witness who heard a violent argument in the victim's room earlier in the evening of the crime. The court ordered the state to respond to the motion within fourteen days and the defense was instructed that it could contest the response if it was not satisfactory. The state answered that it had no knowledge of a witness who heard an argument earlier in the evening, but that it did know of a witness who would testify at trial in regard to a violent argument in the victim's room near the time of the murder. Defendant did not contest this reply. Moise Seligman testified at trial that he was staying at the Ramada Inn in the room adjoining that of the decedent on the night of the murder. He stated that he heard an argument and fighting. After the arguing ceased, he heard the shower. Much later, he awoke and found his room flooded with water and blood.

No provision in the discovery articles mandates that the state furnish the defense with the names of its witnesses, especially when their testimony does not bear directly on guilt or innocence. Further, this testimony was not exculpatory.

This assignment lacks merit.

ASSIGNMENTS OF ERROR NOS. 10 AND 11

By these assignments, defendant objects to the qualification of Officer Tullos as an expert in fingerprint identification on the ground that he was not properly qualified because a certificate from the F.B.I. Fingerprint School was not filed into the record. The defense stipulated that Officer Tullos could testify as an expert provided a copy of his certificate was filed into the record prior to the end of trial. It appears that a certificate was not filed. However, Officer Tullos was permitted to testify as an expert on the basis of the parties' stipulation. Any error in this regard is harmless. The record indicates that Officer Tullos had attended the F.B.I. Fingerprint School and was certified. He had over seven years experience and had qualified as a fingerprint expert in previous trials.

Assignment No. 11 challenges a question posed to Officer Tullos as an expert. Since we find that defendant's objection to Officer Tullos' qualification as an expert is unfounded, this question was not beyond the scope of his expertise.

These assignments lack merit.

ASSIGNMENT OF ERROR NO. 12

By this assignment, defendant contends that pictures of the body of the victim which were introduced at trial were inflammatory and of no evidentiary nor probative value. There is no merit to this assignment. The photographs were introduced by the state to show the scene of the offense and to prove the corpus delicti. They may well be described as gruesome,

but are relevant. Defendant has not demonstrated that the nature of the pictures prejudiced his case.

ASSIGNMENT OF ERROR NOS. 13 AND 14

Defendant objects to the introduction of a drawing of the motel room where the homicide occurred on the ground that Officer Tullos was not qualified to testify about the drawing because he had not prepared it and a proper foundation was not laid. We agree with the trial court's decision to allow admission of the drawing as the best representation of the murder scene.

These assignments lack merit.

ASSIGNMENT OF ERROR NO. 15

Defendant contends that certain questions posed to Dr. Thomas F. Gilchrist, an expert in pathology who performed an autopsy on the victim, were improper. Dr. Gilchrist testified about the cause of death and was then asked whether the multiple injuries sustained by the deceased were normally associated with any particular type of case. The doctor replied that in his experience, the patterns presented in this case "have usually been associated with some sort of sexual conflict or some sort of sexual motive." Defendant argues that this testimony goes beyond the scope of a pathologist's expertise and is improper opinion testimony.

C.Cr.P. 464 provides:

> "On questions involving a knowledge obtained only by means of a special training

> or experience the opinions of persons having such special knowledge are admissible as expert testimony."

Dr. Gilchrist testified what his experience had been as to the usual motive in cases of this sort. Thus, due to his experience, he was qualified to answer the questions.

This assignment lacks merit.

ASSIGNMENT OF ERROR NOS. 16, 17, 18, 19, 36A

By these assignments, defendant contends that certain tangible items introduced into evidence were not mentioned by the state in its opening statement, that a proper foundation was not laid, and that testimony about these items was improper. Officer Hickey was questioned by the state regarding the identity of items seized from the motel room.[4] We find no abuse of discretion in the trial court's ruling that the state need not specifically mention each and every piece of physical evidence during the opening statement. See C.Cr.P. 766. Further, the questions asked of Officer Hickey, Shirley Mirambell and Jan Mirambell prior to the acutal introduction of the items into evidence were necessary to establish a foundation.

Defendant also objects to the trial court's rulings that restricted re-cross to the scope of direct examination and permitted Officer Hickey to answer questions considered leading by the defense. We find no abuse of discretion.

These assignments lack merit.

ASSIGNMENT OF ERROR NO. 31

By this assignment, defendant contends that the trial court erred in refusing to grant his motion for a mistrial. The motion was based on the revelation by a juror that she had been making notes regarding the case at home each evening. The juror insisted that the notes had not been brought to the courtroom or shown to anyone. We do not find that the notes composed by the juror in this case caused prejudice to the right of the accused to obtain a fair trial. See State v. Ledet, 298 So.2d 761 (La. 1974).

This assignment lacks merit.

ASSIGNMENT OF ERROR NO. 20, 21, 22, 23, 24, 25, 27

By these assignments defendant argues that the trial court erred in admitting the alleged hearsay testimony of five witnesses. The state called five witnesses who testified that they had received telephone calls a few days before the crime was committed from an unknown male caller who sought to ascertain the victim's whereabouts. The state offered the testimony to show that the conversations had in fact occurred and not for the truth of the matter asserted in the calls. Evidence is non-hearsay when offered not to show the truth of the matter asserted, but to prove that the utterance occurred or that a conversation had taken place. State v. Toomer, _____ _____ So.2d _____ (La. 1981), Docket No. 80-KA-2063; State v. Hatcher, 372 So.2d 1024 (La. 1979); State v. Ford, 368 So.2d 1074 (La. 1979).

Mona Draper, the roommate of Amanda Keller, testified that she received a phone call inquiring as to the whereabouts

of Ms. Keller. Defendant objects to Ms. Draper's observation that the call sounded like it was being made long distance. The court instructed the jury to disregard the comment; this admonishment was sufficient to cure any error. We find no reversible error in this testimony.

These assignments lack merit.

ASSIGNMENTS OF ERROR NOS. 26, 29 AND 40A

By these assignments, defendant asserts that there was error in the introduction of testimony regarding a pretrial photographic line-up and an in-court identification. At no time during the trial did defendant object to the admission of the identification evidence or testimony nor was a motion to suppress the identification filed. Thus, defendant has waived his right to assert this assignment. C.Cr.P. 841.

ASSIGNMENT OF ERROR NOS. 30, 45 AND 46

By these assignments, defendant urges that the trial court committed error in restricting his examination of three witnesses. These assignments are without merit. During trial, the defense asked State Police Trooper Lott whether he knew if the money clip was identified after police had seized it. The state's objection on the ground of hearsay was sustained. The trial court's ruling was probably incorrect, but harmless.

During the hearing on the motion for a new trial, the defense repeated questions on re-direct already asked of Sylvester Grant by the defense on direct examination. The trial court sustained the state's objection that the questioning was repetitious. Defendant also called Marvin Johnston, supervisor of the records division of the Monroe Police Department, at the hearing in an

effort to prove a deal existed between Grant and the police. The records of Grant's arrests and convictions were introduced into evidence. The state objected to Johnston reading the contents of the records out loud on the ground that the records were the best evidence and self-explanatory. The trial judge is vested with sound discretion to stop unnecessary examination and his ruling will not be disturbed unless an abuse of discretion is shown. R.S. 15:275; State v. Murray, 375 So.2d 80 (La. 1979). No abuse has been shown.

These assignments lack merit.

ASSIGNMENT OF ERROR NO. 49

Defendant insists that testimony during the questioning of Detective Joe Cummings at the hearing of the motion for a new trial constitutes hearsay. In support of his motion, defendant argues that the state had failed to reveal the existence of an interview between the police and a defense witness, Gene Jurgens. Jurgens testified at the hearing. Then the state called Detective Cummings to give his version of the interview. Cummings testified that Jurgens was "nervous," "upset" and "evasive with his answers." Despite the defendant's objection, the court allowed Cummings to testify as to what Jurgens had told him during the interview. The testimony was not offered for the truth of the matter asserted; rather, it was offered to prove that the conversation had occurred and that certain statements had in fact been made by Jurgens contrary to his earlier testimony. Thus, the testimony was admissible. See State v. Launey, 335 So.2d 435 (La. 1976).

This assignment lacks merit.

ASSIGNMENTS OF ERROR NO. 47 and 48

By these assignments, defendant asserts that the state's proffer of the results of a psychological stress evaluator test conducted on Sylvester Grant constitutes error. After argument by counsel, the trial court ruled the test results inadmissible because it was not satisfied with the reliability of the test. Defendant has failed to demonstrate how this favorable ruling prejudiced him.

These assignments lack merit.

ASSIGNMENT OF ERROR NO. 43

By this assignment, defendant submits that the trial court erred in denying his motion for a new trial on the ground that there is no evidence that the defendant committed the crime. See C.Cr.P. 851(1). To the contrary, the record contains substantial and convincing evidence pointing to defendant as the perpetrator of the murder.

This assignment lacks merit.

Finding no merit in the assignments, the defendant's conviction and sentence are affirmed.

---

1. Because of this finding, it is unnecessary for us to rule on the state's motion to supplement the record with testimony given by Walker and Jackson in a bribery prosecu-

tion brought against Naas for payments allegedly made to these witnesses and others in exchange for their favorable testimony at the hearing on the motion for a new trial.

We do not consider other testimony offered at the hearing of sufficient weight to meet the standard set forth in C.Cr.P. 851(3). The testimony of Connie Naas and Paul Scoriels that the money clip found in Naas' apartment resembled one owned by Naas rather than the decedent was inconclusive and not overly persuasive. If viewed in light of the test of C.Cr.P. 851(4), the state's failure to disclose the arguably beneficial statements does not amount to prejudicial error.

Also, defendant's contention that Grant's testimony at the trial was colored by a deal between him and the police was not borne out at the hearing. Neither the police officers who interviewed Grant nor Grant himself alluded to any promises or deals struck between them. Grant's testimony at the hearing paralleled his earlier trial testimony.

2. The defense also argues that Grant's testimony which consisted of statements made by defendant to Grant is inadmissible hearsay. See Assignments of Error Nos. 32 and 36. The court properly admitted the testimony under the declaration against interest exception. Neither do we find that the state's questioning of Grant was impermissibly leading. See Assignment of Error No. 35.

Defendant also argues that the earlier statement were inadmissible because no Miranda warnings were given to defendant before he talked to Grant. This argument lacks merit. Although the defendant was in prison at the time the confessions were made to Grant, and therefore in custody, there was no interrogation by any figure of authority and no intimidating atmosphere so as to require

the safeguards set forth in Miranda for custodial interrogation. See State v. McDonald, 387 So.2d 1116 (La. 1980), cert. denied _____ S. Ct. _____ (198). Defendant simply misplaced confidential information with one whom he believed to be trustworthy.

3. Defendant also argues that the trial court committed reversible error in restricting his cross-examination of Officers Calhoun and Cummings with whom Grant had dealt. See Assignment of Error No. 33. The court ruled that defendant's questions regarding when Grant's statement was transcribed were irrelevant. Its relevance has not been shown.

4. The evidence compained of consists of a rope, coins, grips, two coffee cups, a glove, water glass, money clip, motel bill, an unmarked copy of a police transfer receipt on the evidence, a group of photographs, clothing of the victim, a container of blood obtained from Mulhearn Funeral Home, a gun with five rounds of ammunition and a projectile taken from the victim's body, and the bottom sheet of the victim's motel bed.

5. The witnesses were Ms. Shirley Mirambell, mother of the victim; Jan Margaret Mirambell, sister of the victim; Katherine Elizabeth Smith, the victim's receptionist; Mona Katherine Draper, the roommate of the victim's girlfriend; and Amanda Keller, the victim's girlfriend.

SUPREME COURT OF LOUISIANA

STATE OF LOUISIANA

VERSUS NO. 80-KA-2446

RICHARD GLEN NAAS

CALOGERO, Justice, dissenting

I dissent from the majority opinion and would grant defendant a new trial for the reasons expressed in the majority opinion on original hearing.

The majority determination on rehearing that defendant is not entitled to a new trial, notwithstanding his newly discovered evidence, emphasized the "questionable nature of 'jailbird' testimony" (reference to Walker and Jackson who testified that Grant had confessed to them that he committed the crime). The majority concluded that defendant's new evidence was insufficient to support a finding that its admission would result in a different verdict. Their reliance on the fact that "jailbird" testimony is of a "questionable nature" serves to further emphasize the extreme prejudice to defendant when the state failed to notify him until trial of the inculpatory statement attributed to him by its key witness, Grant, himself a "jailbird". Such failure on the part of the state, to notify defendant of his alleged confession (information the state had in its possession for some eight months prior to trial), as was

required under La. C.Cr.P. art. 716B, prevented defendant from investigating the circumstances surrounding Grant's damning testimony.

For technical reasons expressed in the original opinion concerning defendant's failure to object to the late notification of Grant's testimony, we did not rely on the prejudicial effect of its admission at trial in our original determination to grant a new trial. However, it did in part influence our original determinating (considering the patent unfairness involved) and ought at least to affect the present majority's reliance on the fact that defendant's witnesses on motion for new trial were "jailbirds".

Appendix C

SUPREME COURT OF LOUISIANA

New Orleans, 70112

News Release No. 22

FOR IMMEDIATE NEWS RELEASE

FROM CLERK OF SUPREME COURT OF LOUISIANA

On the 19th day of February 1982, the following action was taken by the Supreme Court of Louisiana, composed of Chief Justice John A. Dixon, Jr.; and Associate Justices Pascal F. Calogero, Jr., Walter F. Marcus, Jr., James L. Dennis, Fred A. Blanche, Jr., Jack Crozier Watson, and Harry T. Lemmon, in the cases listed below:

REHEARINGS GRANTED:

81-KA-0422 State of La. v. Rosetta K. Jackson

81-KA-0876 State of La. v. John E. Smith

REHEARINGS DENIED:

80-KA-2446 State of La. v. Richard Glen Naas

CALOGERO, J., would grant a rehearing.

81-KA-0870 State of La. v. Ronald J. Sugar

81-O-0946 Godwin v. East Baton Rouge Parish School Board
DIXON, C.J., CALOGERO & DENNIS,J., would grant a rehearing.

81-KA-1174 State of La. v. Andrew M. Thibodeaux

81-KA-1220 State of La. v. Cipriano Julian Valdez

81-KA-1343 State of La. v. Leroy Freeman and Geralding Miles.

81-KA-1407 State of La. v. Carl E. Perry and Bettye R. Perry
DENNIS, J., would grant a rehearing.

81-KA-1442 State of La. v. Frankie S. Middlebrooks, a/k/a Frankie Joe Middlebrooks
See Per Curiam

81-KA-1452 State of La. v. Shelton Messer
DENNIS, J., would grant a rehearing.

81-K-1509 State of La. v. Dick Hearing, Walter Bankston and John A. Pritchett
WATSON, J., would grant a rehearing.
LEMMON, J., concurs in denial with reasons.

81-KA-1699 State of La. v. Margaret Rachel Goza
LEMMON, J., concurs in denial with reasons.

81-C-1741 Patricia McCarthy, etc., et al v. Shell Oil Co.
DENNIS, J., would grant a rehearing.

81-C-1976 Henry Collins et ux v. Capitol Valve & Fitting Inc, et al
DIXON, C.J., CALOGERO & LEMMON, JJ., would grant a rehearing.

81-C-2117 Joseph Lytell v. Donald Hushfield, et al

81-K-2181 State of La. v. Orman Walters
MARCUS & BLANCHE, JJ., would grant a rehearing.

81-C-1092 T. J. Ivy, Sr., v. American Road Insurance Co.
See Per Curiam.

Opposition

Cir
DISTRIBUTED
JUN 4 '82

81-1955

NO. _____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1982

RECEIVED
JUN 4 1982
OFFICE OF THE CLERK
SUPREME COURT, U.S.

. . . . . .

RICHARD GLEN NAAS

Petitioner

VERSUS

STATE OF LOUISIANA

Respondent

. . . . . .

PETITION FOR WRIT OF CERTIORARI TO

THE SUPREME COURT OF THE

STATE OF LOUISIANA

. . . . . .

OPPOSITION TO WRIT OF CERTIORARI

. . . . . .

WILLIAM J. GUSTE, JR.
ATTORNEY GENERAL
STATE OF LOUISIANA

BARBARA B. RUTLEDGE
ASSISTANT ATTORNEY GENERAL
STATE OF LOUISIANA

JOHNNY C. PARKERSON
DISTRICT ATTORNEY
FOURTH JUDICIAL DISTRICT

LAVALLE B. SALOMON
ASSISTANT DISTRICT ATTORNEY
FOURTH JUDICIAL DISTRICT
POST OFFICE BOX 1652
MONROE, LOUISIANA 71201

10

TABLE OF CONTENTS

Summary of Argument	1
Statement of the Case	2
Argument	3
Conclusion	8
Certificate	8

TABLE OF AUTHORITIES

Case Law	Page
Brady v. Maryland, 373 U.S. 83, 85 S. Ct. 1194, 10 L. Ed. 215 (1963)	6
State v. Bonanno, 373 So. 2d 1284 (La. 1979)	3
State v. Godeaux, 378 So. 2d 941 (1979)	5
State v. Roussel, 381 So. 2d 796 (La. 1980)	4
United States v. Delay, 500 F. 2d 1361 (8th Cir. 1974)	4
United States v. Hubbard, 603 F. 2d 137 (10th Cir. 1979)	4
United States v. Millet, 559 F. 2d 253 (CA 5th 1977); Rehearing denied 562 F. 2d 1258; Cert. denied 92 S. Ct. 732, 434 U.S. 1015, 54 L. Ed. 2d 759 (CA 1975)	3
United States v. Rubier, 651 F. 2d 628 (9th Cir. 1981)	4
United States v. Urdisles, 523 F. 2d 1245; Rehearing denied 528 F. 2d 928; Cert. denied, 965 S. Ct. 2625, 426 U.S. 920; 49 L. Ed. 373	3
U.S. v. Augurs, 427 U.S. 97, 96 S. Ct. 2392, 49 L. Ed. 342 (1976)	6

Constitution and Statutory Law	
Federal Rule Criminal Procedure Rule 51, Title 18, U.S.C.A.	3
Louisiana Code of Criminal Procedure, Article 716(B)	2
Louisiana Code of Criminal Procedure, Article 729.3	2
Louisiana Code of Criminal Procedure, Article 729.5	3

SUMMARY OF ARGUMENT

1

Petitioner sought discovery pursuant to Louisiana Code of Criminal Procedure provisions. The State was dilatory in complying with the request. When the untimely answer was received, no objection was entered by the petitioner. Had a contemporaneous objection to the inculpatory statement at issue been placed before the trial court, various sanctions including a prohibition of the introduction of the subject matter evidence could have been imposed. As an objection on the ground now before this Court was not raised at trial, petitioner is barred review under both State and Federal jurisprudence.

2

Petitioner submits two interrelated claims of sixth amendment violations of his right to counsel and effective cross-examination.

a) The denial of effective cross-examination claim was not placed before the trial court by a contemporaneous objection; review is now barred.

a) An inculpatory statement given by the defendant to a cellmate after his retaining counsel was not procured by the State or its agents, but was secured simply by the defendant misplacing his confidence in another individual. This individual, unknown to the State before then, voluntarily came foward and related his knowledge to law enforcement officials. There were no violations of the defendant's Sixth Amendment Rights.

3

Petitioner's final assertion claims a suppression of exculpatory information in two instances by the State.

a) It is claimed the State did not supply information it held as to the existence of so-called alibi witnesses. The State supplied nine (9) months prior to trial, the names, addresses and summation of testimony of all witnesses it believed to have information as to the petitioner's whereabouts on or about the day of the homicide,by written motion.

b) Petitioner claims the State granted immunity or 'struck a deal' with a crucial State's witness and that this information was not disclosed. Evidence at trial and in all post trial proceedings conclusively proved no deals were struck or discussed.

Both claims are thus without evidentiary support.

STATEMENT OF THE CASE:

The State adopts the facts as recited in the opinions of the Louisiana State Supreme Court as follows:

> Defendant, Richard Glen Naas, was charged by bill of indictment with second degree murder in violation of R.S. 14:30.1. The jury returned a verdict of guilty and Naas was sentenced to life imprisonment at hard labor without probation or suspension of sentence, and without parole eligibility for forty years.
>
> ". . . In the early morning hours of March 8, 1978, officers of the Monroe Police Department were called by the manager of the local Ramada Inn to investigate a possible homicide at that motel. Upon entering room 428, the officers discovered the body of the victim, John J. Mirambell, Jr., submerged in the bathtub. The victim's hands were tied behind his back and, according to the pathologist's report, the victim had multiple cuts, bruises, and lacerations, along with two non-fatal stab wounds to the back and a fatal gunshot wound to the left temple.
>
> The victim was a resident of the New Orleans area and had been in Monroe on business. At the time of his death, he was engaged to be married to Ms. Amanda Keller, also of the New Orleans area. Ms. Keller had previously dated the defendant, Richard Naas, but had broken off her relationship with him. On March 4, 1978, several days before the murder, Ms. Keller announced to the defendant her plans to marry Mirambell.
>
> The State's case against defendant consisted of the following: the testimony of several witnesses that the defendant several days after the homicide, had a black eye, suggestive of the possibility that shortly before, he was involved in some sort of fracas, or struggle; a money clip found in possession of the defendant which several witnesses said was similar to one owned by the victim; the testimony of one Mary Kelly, a waitress at Monroe's KoKoMo Restaurant[1], who identified the defendant as having been present in that establishment on the evening prior to the murder; the testimony of Sylvester Grant, a cellmate of the defendant following defendant's arrest for the instant crime, that the defendant admitted committing the Ramada Inn murder; the testimony of the victim's mother, sister, and receptionist that they had received telephone calls shortly before the murder from an unknown male inquiring concerning the whereabouts of the victim; and the testimony of Amanda Keller's roommate that she had received a call from the defendant on the night of the murder which in her opinion sounded as if it was being made long distance."

---

1. The KoKoMo Restaurant was within the same Ramada Inn where the homicide occurred.

A hearing was held in connection with defendant's motion for a new trial, at which the following testimony was given:

> ". . .Gene Juergens, who was a co-worker of defendant, stated that he had informed Detective Cummings upon being asked by the officer to inspect a money clip seized from the defendant's apartment, that the clip appeared to be the one belonging to the defendant; Paul Scoriels, an acquaintance of defendant, testified that he had seen defendant at the Jefferson Parish Courthouse on Monday, March 6, 1978, one day before the murder, and had at that time observed defendant to be sporting a mustache; Kenneth Walker and Johnny Jackson, both former cellmates of Sylvester Grant and of defendant, testified that they heard Grant brag repeatedly that he himself had committed the homicide at the Ramada Inn; Connie Naas, defendant's ex-wife, stated that the money clip taken by police from the defendant's apartment was a gift to defendant from his employer in New Orleans some years prior to the homicide; Trudy Dufrene, a waitress at the Round Table Lounge in Gretna, Louisiana, testified that she had told police a week after the murder that she saw defendant in the Round Table between 8:30 and 10:00 P.M. on Tuesday, March 7, 1978."

A R G U M E N T

1

THE UNOBJECTED TO NON-COMPLIANCE WITH LOUISIANA STATE DISCOVERY ARTICLES DOES NOT PRESENT A QUESTION FOR REVIEW OF CONSTITUTIONAL PROPORTION.

Petitioner asserts that the State's failure to comply with Louisiana Code of Criminal Procedure, Articles 716(B) and 729.3 is prejudicial error necessitating reversal.

Trial counsel for petitioner sought discovery by written motion prior to trial, on April 10, 1978. The State replied by written motion on April 26, 1978, and May 12, 1978. Pre-trial hearings concerning the sufficiency of the State's answer were heard by the bench on April 27, 1978. In June of 1978, the State became aware of an oral inculpatory admission by the defendant to one Sylvester Grant, a cellmate of the defendant. The State on February 5, 1979, pursuant to Louisiana Code of Criminal Procedure, Article 768, gave written pretrial notice of its intent to use the defendant's oral statements. The State by this notice complied with discovery Article 716(B) which provides:

> "Upon motion of the defendant, the court shall order the district attorney to inform the defendant of the existence, but not the contents, of any oral confession or statement of any nature, made by the defendant, which the district attorney intends to offer in evidence at the trial, with the information as to when, where and to whom such oral confession or statement was made." La. C. Crim. Proc. Art. 716(B). Emphasis Added.

Though it was some eight months after the awareness of its existence, Louisiana Code of Criminal Procedure, Article 729.5 provides sanctions for a failure or delayed compliance with court ordered discovery, including the granting of a continuance, mistrial, or prohibiting introduction at trial of the non-disclosed subject matter. In the instant case, the petitioner sought none of the sanctions enumerated in Article 729.5. Counsel for petitioner voiced objections on two gounds hearsay (Tr. 577) and entrapment (Tr. 578). By not objecting to introduction of the statement on the ground that the State had failed in its duty to timely answer discovery petitioner did not afford the trial court the opportunity to impose sanctions to rectify any prejudice or inequity created. Similarly, a failure to contemporaneously object on the specific grounds alleged on appeal has barred review in both the State and Federal Courts. See State v. Bonanno, 373 So. 2d 1284 (La. 1979); Federal Rule Criminal Procedure Rule 51, Title 18, U.S.C.A.; United States v. Millet, 559 F. 2d 253 (CA 5th 1977), Rehearing denied 562 F. 2d 1258, Cert. denied 92 S. Ct. 732, 434 U.S. 1015, 54 L. Ed. 2d 759 (CA 1975) United States v. Urdisles, 523 F. 2d 1245, Rehearing denied 528 F. 2d 928, Cert. denied, 96 S. Ct. 2625; 426 U.S. 920; 49 L. Ed. 373.

Of note, is the opportunity presented to petitioner for a stay to which he objected. The State sought a three day stay to apply for writs to the State Supreme Court (Tr. 585-590) to question the trial court's ruling denying admission of a second 'jailhouse' statement by the petitioner. Petitioner vehemently objected. Thus, had counsel wished for additional time to prepare in defense of the statement, it was infact available.

2

PETITIONER'S SIXTH AMENDMENT RIGHTS WERE NOT VIOLATED.

(a) Petitioner belatedly asserts he was denied an opportunity for effective cross-examination.

Counsel for petitioner received notice of the State's intent to use the statements of Naas to Sylvester Grant on February 5, 1979. Grant was called to testify by the State on February 9, 1979. Examination of Grant covered some 92 pages of testimony, including sixty-four (64) pages of cross-examination Tr. 532-624. All facets of the State's witness' background, present charges and disposition of such, past criminal history, and events surrounding the statements were explored by petitioner's trial counsel.

The record is devoid of any contemporaneous objection by the petitioner urging this ground (lack of confrontation) in pre-trial proceedings or at trial on the merits. Such a failure to object once the evidence or witness is offered constitutes a waiver of the objection. State v. Roussel, 381 So. 2d 796 (La. 1980). Similarly, the Federal courts have held repeatedly that a party's failure to make a timely objection at trial constitutes a waiver precluding the assertion of error postrial or on appeal. United States v. Millet, supra; United States v. Rubier, 651 F. 2d 628 (10th Cir. 1981); United States v. Hubbard, 603 F. 2d 137 (9th Cir. 1979).

(b) Petitioner alleges a second violation of the Sixth Amendment Right to Counsel, claiming Sylvester Grant conducted an intentional, law enforcement induced interrogation of the petitioner while they were cellmates.

The State's witness (Grant), was called to testify regarding conversations he had with defendant between May 26, 1978 and June 2, 1978. Petitioner objected on the basis of hearsay and entrapment.

On May 26, 1978, Richard Naas was incarcerated in Cell F-1 at the Ouachita Parish Jail, as was Sylvester Grant. During the period between May 26, 1978 and June 2, 1978, Richard Naas confided in his fellow prisoner, Sylvester Grant, and told him of the offense. On June 2, 1978, Sylvester Grant came foward voluntarily and told a Sheriff's Department investigator of the statements made to him by Richard Naas. The investigator called the Monroe Police detective in charge of the investigation and these officers received the information given by Sylvester Grant. Thereafter, Sylvester Grant was allowed to return to the same cell and to talk more with Richard Naas. On June 5, 1978, Sylvester Grant was removed from his cell and these officers received additional information. The trial judge ruled that the statements made by Richard Naas to Sylvester Grant between May 26, 1978 and June 2, 1978 were admissible, being voluntary and not induced by local officers but declined to admit those statements given between June 2, 1978 and June 5, 1978. (Tr. 532-583, Vol. V). As can be readily seen, the statements admitted when Grant was returned to the cell by law officers were not in any fashion a planned impermissable interrogation.

Extradjudicial admissions made by a defendant were discussed in United States v. Delay, 500 F. 2d 1361 (8th Cir. 1974), where the Court stated the applicable rule as follows:

> "The prosecution may not use statements, whether exculpatory or inculpatory, stemming from custodial interrogation of the defendant unless it demonstrates the use of procedural safeguards effective to secure the privilege against self-incrimination. By custodial interrogation, we mean questioning initiated by law enforcement

officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way." (Emphasis supplied.)

The statements made by Richard Naas to Sylvester Grant between May 26, 1978 and June 2, 1978 were not initiated by law enforcement officers but by petitioner himself. Petitioner misplaced his confidence. The admissions of defendant were admissible as an exception to the hearsay rule. See State v. Godeaux, 378 So. 2d 941 (1979).

All of the evidence in regard to these admissions of defendant to his fellow prisoner indicate that the statements were freely made.

3

THE STATE DID NOT WITHHOLD EXCULPATORY INFORMATION

Petitioner in his Fourth Supplemental Motion for New Trial asserted two witnesses, A.J. Doming and Trudy Dufrene, could give evidence on his behalf and that the State had not disclosed this evidence prior to trial.

A.J. Doming, the husband of Trudy Dufrene, at no point offered testimony which would have provided an alibi for Richard Naas on the night of the offense. Tr. 46-51 (Vol. VI). He testified that he told the investigating officers that he thought he had seen the man in the picture (Richard Naas) in his lounge on the Friday following the offense. This was denied by the investigating officers. Tr. 59-60, 65 (Vol. VI). Had petitioner contacted Trudy Dufrene (Mrs. A.J. Doming) he may well have learned this information prior to trial. The State was nonetheless totally unaware of the existence of the claimed information.

Over nine (9) months before trial, the State provided defendant with the name and correct, complete address of Trudy Dufrene along with the information that she might say she had seen defendant on the night of the offense. Tr. 38 (Vol. I). Such was provided by written motion in April, 1978, in answer to defendant's bill of particulars.

Detective Edward Beckendorf of the Jefferson Parish Sheriff's Department testified he talked to Trudy Dufrene on two occasions. On March 17, 1978, he talked with her and she said she had seen the man in the picture (Richard Naas) in the Round Table Lounge in Gretna but could not remember the date. On April 13, 1978, he went back and took a written statement which this witness signed. In the written statement the detective asked her a leading question regarding the specific date he was interested in (March 7-8, 1978) and she said she had seen Richard Naas on that night. Tr. 57-58, 65-66 (Vol. VI).

In addition to Trudy Dufrene, the State had informed defendant that Ester Tomlinson might be an alibi witness for defendant. This witness testified at trial and gave confusing testimony. She said Richard Naas had been in her restaurant (Pitt Grill - Metairie) between 1:30 A.M. and 3:00 A.M. on March 7, 1978 the day before the murder and had returned about 3:00 A.M. on March 8, 1978 (the morning of the murder) to remind her he had been there the night before. This conflicted with what she had told investigating officers on April 13, 1978. Tr. 634-638 (Vol. V).

The testimony of Trudy Dufrene was not "newly discovered evidence" since the State informed defendant of this witness over nine (9) months before trial. Additionally, the testimony of Trudy Dufrene was confusing, as was the testimony of Ester Tomlinson, and would not have changed the verdict of the jury. As the information was supplied to petitioner, the State complied with the holdings of Brady and Augurs. See Brady v. Maryland, 373 U.S. 83, 85 S. Ct. 1194, 10 L. Ed. 215 (1963); U.S. v. Augurs, 427 U.S. 97, 96 S. Ct. 2392, 49 L. Ed. 342 (1976).

Petitioner asserts a second Brady violation occurred in that the State did not reveal a grant of immunity between itself and Sylvester Grant.

Grant was extensively cross-examined at trial, as were the law enforcement officers investigating the homicide, as to any 'deals' between Grant and the State. All denied the existence, or the knowledge of such arrangements in exchange for his testimony.

In post trial evidentiary hearings the testimony of all parties was consistent with that at trial, no promise or deals were struck.

A factual basis is not now presented nor was it produced at trial, in postrial proceedings or in petitioner's two hearings before the Louisiana State Supreme Court as to this allegation. As the claim for relief is based upon pure speculation, there is no evidence of a suppression by the State of exculpatory materials.

C O N C L U S I O N

It is respectfully submitted that the Writ of Certiorari should be denied for the reasons herein presented.

RESPECTFULLY SUBMITTED,

WILLIAM J. GUSTE, JR.
ATTORNEY GENERAL
STATE OF LOUISIANA

BARBARA B. RUTLEDGE
ASSISTANT ATTORNEY GENERAL
STATE OF LOUISIANA

JOHNNY C. PARKERSON
DISTRICT ATTORNEY
FOURTH JUDICIAL DISTRICT

LAVALLE B. SALOMON
ASSISTANT DISTRICT ATTORNEY
FOURTH JUDICIAL DISTRICT
POST OFFICE BOX 1652
MONROE, LOUISIANA 71201

BY: _____
LAVALLE B. SALOMON

C E R T I F I C A T E

It hereby is certified that a copy of the foregoing Opposition to Writ of Certiorari was this day served upon Mr. James D. Sparks, Jr., Attorney for Petitioner, P.O. Box 4268, Monroe, Louisiana, 71201, by depositing same in the United States mail, postage prepaid.

MONROE, LOUISIANA, this 1st day of June, 1982.

_____
LAVALLE B. SALOMON